



ATTORNEY GENERAL OF MISSOURI  
ERIC SCHMITT

August 19, 2021

Mr. Andrew Lange  
Office of Regulatory Affairs, Enforcement Programs and Services  
Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)  
99 New York Ave. NE, Mail Stop 6N-518  
Washington, DC 20226

ATTN: ATF 2021R-05

RE: ATF's Proposed Rule on "Ghost Guns" Impermissibly Expands Congress' Definition of "Firearm" in the Gun Control Act of 1968

Dear Mr. Lange:

I write with grave concern about the ATF's Proposed Rule on so-called "ghost guns," that among other things, impermissibly expands the definition of "firearm" in the Gun Control Act of 1968 to include incomplete "frames or receivers" and any part of a gun that can house even one mechanism of the firing process. *See* Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27720 (May 21, 2021).

Relevant here, the Act defines "firearm" as "any weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" *or* "the frame or receiver of any such weapon[.]" 18 U.S.C. § 921(a)(3)(A)-(B). Neither Congress nor ATF defined "weapon," but the dictionary defines that term as "an instrument of offensive or defensive combat: something to fight with: something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2589 (2002).

The Act also does not define either "frame" or "receiver." *United States v. Rowold*, 429 F. Supp. 3d 469, 473 (N.D. Ohio 2019). One of the first steps in manufacturing a firearm is milling or forging a blank. Colloquially a blank<sup>1</sup> is often referred to as an "80%" receiver, a piece of metal

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<sup>1</sup> The firearms industry also colloquially refers to these objects for marketing purposes as "receiver blanks," "frame blanks," "partially-manufactured frames," "partially-manufactured receivers," "80% frames," "80% receivers," "unfinished frames," or "unfinished receivers." Indeed, ATF itself has advised that unfinished receivers are not firearms under the Gun Control Act because they have not "reached the 'stage of manufacture'" to be classified as such. *Are "80%" or "Unfinished" Receivers Illegal?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9CUnfinished%E2%80%9D-receivers-illegal> (last visited July 1, 2021); *What is an "80%" or "Unfinished" Receiver?*, BUREAU OF ALCOHOL,



or plastic which, after drilling and milling, can accommodate the various parts of the firearm (trigger, grip, ammunition feeder, barrel, etc.). In layman's terms, the "receiver" is the part of a firearm that provides housing for the components that enable a gun to shoot bullets. Thus, ATF "has adopted a gap-filling regulation that defines the term 'frame or receiver' as '[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.'" *Id.* (alteration in original) (quoting 27 C.F.R. § 478.11). "This means a receiver must have the housing for three elements: hammer, bolt or breechblock, and firing mechanism." *United States v. Jimenez*, 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016).

The Proposed Rule seeks to regulate partially completed (but ultimately incomplete) frames and receivers when sold in "weapon parts kits" containing all of the tools necessary to assemble a firearm to make it fully functional. ATF states that while these kits "in their unassembled, incomplete, and/or unfinished state or configuration generally will not expel a projectile by the action of an explosive at the time of sale or distribution," they "are 'designed to' or 'may readily be converted' to expel a projectile by the action of an explosive" and are, therefore "firearms" under the Act. 86 Fed. Reg. 27720, 27726 (footnotes omitted).

Thus, many gun kits and "80% receivers"—i.e., 80% finished, 80% complete—would now be regulated the same as fully functional firearms and finished receivers. In other words, they couldn't be sold without a serial number or without the buyer undergoing a background check. *Id.* Kits presumably could still be purchased online, but no longer could be mailed to a person's residence (they would have to be shipped to a brick-and-mortar firearms licensee and picked up in person). The Proposed Rule raises several concerns.

Under our system of government, Congress makes laws and the President, acting at times through agencies like ATF, "faithfully execute[s]" them. U.S. CONST. Art. II, § 3; *see Medellín v. Texas*, 552 U.S. 491, 526–27 (2008). The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014) (Scalia, J.). But it doesn't include a power to revise clear statutory terms that turn out not to work in practice. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute"). Allowing an agency to do otherwise "would deal a severe blow to the Constitution's separation of powers." *Util. Air Regul. Grp.*, 573 U.S. at 327.

ATF's interpretation of the Gun Control Act contradicts the plain and ordinary meaning of several definitions contained in the Act. They claim that the Proposed Rule is necessary because the current definitions of "frame or receiver" are "outdated." 86 Fed. Reg. 27720, 27739; *see also id.* at 27727 (proposing to "replace" definitions of "frame or receiver" in favor of definitions that would cover "most current firearms"); *id.* (proposed definition would clarify phrase to "include[] how most modern-day firearms operate").

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TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/qa/what-%E2%80%9C9C80%E2%80%9D-or-%E2%80%9C9Cunfinished-receiver> (last visited July 1, 2021).



Therein lies the problem; a statute must be interpreted “in accord with the ordinary public meaning of its terms at the time of its enactment.” *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). Thus, Article III courts—much less Article II agencies—can’t “add to, remodel, update, or detract from old statutory terms” based solely on their “own imaginations[.]” *Id.* To do otherwise “would risk amending statutes outside the legislative process reserved for the people’s representatives” and “deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.” *Id.*

But that is precisely what ATF seeks to do in issuing its Proposed Rule. For example, 80% receivers, by definition, are incomplete because the remaining 20% requires further assembly—whether by a licensee in a commercial setting<sup>2</sup> or a hobbyist for personal use.<sup>3</sup> The salient point is that 80% receivers are not complete or finished receivers; they are “almost” receivers. So too frames. But the plain and original meaning of “frame or receiver” in 1968 could not have included these “almost” receivers and frames that ATF wishes to regulate now. Indeed, the agency itself tacitly acknowledges this is a new innovation that requires new regulation. *See, e.g.*, 86 Fed. Reg. 27720, 27726 (“In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called ‘80% receivers,’ either directly from manufacturers of the kits or retailers, without background checks or recordkeeping.”) (footnote omitted). If anything, in 1968 Congress must have contemplated *complete or finished* frames or receivers—which are capable of being assembled with other parts to put together a firearm—within these definitions as opposed to incomplete or unfinished ones.

ATF also seems to argue that while kits “in their unassembled, incomplete, and/or unfinished state or configuration generally will not expel a projectile by the action of an explosive at the time of sale or distribution,” they are *still* “‘designed to’ or ‘may readily be converted’ to expel a projectile by the action of an explosive” and are, therefore “firearms” under the Act. *Id.* (footnotes omitted). But that interpretation puts the cart before the horse. It necessarily assumes that a kit, in and of itself, is a “weapon” under the Act. But a weapon can only be an object that can be used to cause harm *without further assembly*. If the object by itself without further assembly can’t cause harm, then it can’t be a weapon. It thus can’t be a “weapon ... designed to or may readily be converted to expel a projectile by the action of an explosive[.]” § 921(a)(3)(A). These objects therefore cannot be fully functional “firearms” within the meaning of the Gun Control Act.

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<sup>2</sup> The original meaning of the Second Amendment clearly protects “the right to engage in firearms commerce[.]” David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 234–35 (2014). And the Second Amendment arguably extends to acts related and necessary to the exercise of the fundamental right to keep and bear arms. *See Luis v. United States*, 136 S. Ct. 1083, 1097–98 (2016) (Thomas, J., concurring) (stating “Constitutional rights thus implicitly protect those closely related acts necessary to their exercise” and noting that the Second Amendment protects the rights to obtain bullets and to train with firearms) (citing *Andrews v. State*, 50 Tenn. 165, 178 (Tenn. 1871) (“The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.”))).

<sup>3</sup> *Accord* 3 THE WRITINGS OF THOMAS JEFFERSON 230 (T.J. Randolph, ed., 1830) (“Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them.”); *see also District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (prohibition on handgun possession “in the home” violated the Second Amendment).



ATF seeks comment on its proposal to regulate incomplete firearms as fully operational firearms but the “short answer is that Congress did not write the statute that way[.]” *Garcia v. United States*, 469 U.S. 70, 79 (1984) (citation omitted), and ATF cannot rewrite clear statutory terms in the Gun Control Act simply to further the current Administration’s policy objectives. The Biden Administration has made no secret of their desire to use every means at their disposal (including the regulatory powers of the ATF) to restrict the rights of law-abiding Americans to “keep and bear arms.” Earlier this year, the White House issued a statement calling on Congress to ban “assault weapons and high capacity magazines” and to repeal “gun manufacturers’ immunity from liability[.]”<sup>4</sup>

In an interview with Anderson Cooper in August 2019, then-candidate Biden confirmed his desire to confiscate guns.


COOPER: So to gun owners out there who say, ‘Well, a Biden administration means they’re going to come for my guns’ –

BIDEN: Bingo. You’re right, if you have an assault weapon. The fact of the matter is they should be illegal, period.<sup>5</sup>

This proposed rule is further evidence that the Biden Administration is attempting to make good on its publicly-stated pledge to its radical anti-Second Amendment constituency. Yet regardless of the wishes of the current administration, the power to create substantive law is vested in the people’s elected representatives in the United States Congress—not in the executive branch. “It is the proud boast of our democracy that we have ‘a government of laws, and not of men.’ ” *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). “The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.” *Id.*

The proposed rule goes beyond the authority granted to the President and to the unelected bureaucrats in the ATF who serve at his pleasure. As such, it should be promptly withdrawn.

Very Truly Yours,

  
Eric S. Schmitt  
Attorney General of Missouri

<sup>4</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic> (last accessed July 8, 2021).

<sup>5</sup> Transcript, CNN, Aug. 6, 2019, available at <http://edition.cnn.com/TRANSCRIPTS/1908/06/nday.03.html> (last accessed June 17, 2021).